(22,100.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 874.

GEORGE PEABODY WETMORE, APPELLANT,

vs.

TENNESSEE COPPER COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF TENNESSEE.

INDEX.

	Original.	Print
Prosecution bond	1	1
Bill of complaint	2	1
Chancery subpœna	20	12
Special appearance of Tennessee Copper Co	22	13
Motion to dismiss	23	13
Special appearance of Ducktown Sulphur, Copper & Iron Co., Ltd.	25	14
Motion to dismiss	26	15
Decree	27	16
Petition for appeal	29	17
Assignment of errors	30	18
Bond on appeal	31	18
Certificate of Judge Sanford as to question of jurisdiction	32	19
Order allowing appeal	33	20
Citation and service	34	21
Opinion	35	21
Clerk's certificate	54	33

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 28, 1910.

1 STATE OF TENNESSEE:

Circuit Court of the United States for the Eastern District of Tennessee, Southern Division.

Know all men by these presents, That we, George Peabody Wetmore as principal, and Charles Seymour as surety — firmly bound unto Ducktown Sulphur Copper & Iron Company, Ltd., and Tennessee Copper Co. in the penal sum of two hundred and fifty dollars, to be void on condition that George Peabody Wetmore prosecute with effect a suit which he is about to commence in said Court, against Ducktown Sulphur Copper & Iron Company, Ltd., and Tennessee Copper Co. or pay all costs and damages incident on failure thereof, or which may be adjudged against us. April 24, 1909.

GEORGE PEABODY WETMORE,
By CHARLES SEYMOUR, *Att'y.*
CHARLES SEYMOUR (*Ci.*).

Endorsed: No. 1047—George Peabody Wetmore vs. Ducktown Sulphur Copper & Iron Co., Ltd., et al. Bond for Costs. Filed April 26, 1909—D. L. Snodgrass, Clerk, By R. F. McClure, Deputy.

2 In the Circuit Court of the United States in and for the Eastern District of Tennessee, Southern Division.

In Equity.

GEORGE PEABODY WETMORE, Complainant,
vs.
DUCKTOWN SULPHUR, COPPER & IRON COMPANY, LIMITED, TENNESSEE COPPER COMPANY, Defendants.

Bill of Complaint.

To the Honorable the Judges of the Circuit Court of the United States for the Eastern District of Tennessee, Southern Division:

I.

The Complainant comes and shows to the Court that he is now and has been at all times herein mentioned a citizen and resident of the state of Rhode Island.

Further, that the defendant Ducktown Sulphur Copper & Iron Company, Limited, was organized and exists under the laws of the United Kingdom of Great Britain, but engaged in business in the State of Tennessee with its main office and place of business in Polk County in the Southern Division of the Eastern District of Tennessee.

Further, that the Tennessee Copper Company is a corporation organized and existing under the laws of the State of New Jersey, but also engaged in business in the State of Tennessee with its main office and place of business in Polk County in the Southern Division of the Eastern District of Tennessee.

3 Your orator states that the Defendant Ducktown Sulphur Copper and Iron Company is a corporation organized under the laws of Great Britain for the purpose of mining, manufacturing and producing sulphur, copper and iron ores and products in said Polk County in the Southern Division of the Eastern District of Tennessee, and in the prosecution of its business, has, and at all times herein mentioned, had, its main office in said Polk County Tennessee. Said Defendant Ducktown Sulphur Copper and Iron Company Limited had, prior to the acts herein complained of, filed a duly certified copy of its Charter with the Secretary of the State of Tennessee, and had applied for and secured a license to locate and carry on business in said state, and under said license and by said authority it has located in the state of Tennessee, and during all the times herein mentioned has carried on its business in the southern division of said Eastern District of said State of Tennessee.

That the Tennessee Copper Company is a corporation chartered under the laws of the State of New Jersey as aforesaid for the purpose of mining, manufacturing and producing copper and sulphur ores and products in Polk County in the Eastern District of Tennessee, Southern Division, and in the prosecution of its business has, and at all times herein mentioned had, its main office and works and operation in said Polk County Tennessee.

II.

Your orator states that he is the owner in fee and in possession of large tracts of land of great value for timber, for farming for residence and many other purposes in said Polk County Tennessee to-wit:

The Big Savannah Farm and its outlying contiguous lands of about 21,000 acres, the main Farm inherited by complainant from his father who died in the year 1862, bounded as follows:

4 The Boundary Line—

Beginning on the top of Starrs Mountain at the point where coming from the West Polk and McMinn County line strikes the top of the mountain;

Thence Northeast along the top of the mountain to the Polk and Monroe County line, being the north line of Section 5 of Fractional Township 2 North of Range 3 East;

Thence south 67 degrees east with the township and county line to the North East corner of Section 4;

Thence south 23 degrees west 160 poles to the middle line of Section 4;

Thence south 67 degrees east 64 poles;

Thence south 23 degrees west 160 poles to the line of Section 10;

Thence south 67 degrees east 96 poles to the middle line of Section 10;

Thence south 23 degrees west 640 poles to the south line of Section 15;
Thence north 67 degrees west 480 poles to the north east corner of Section 20;
Thence south 23 degrees west 160 poles to the middle line of Section 21;
Thence south 67 degrees east 160 poles to the centre of Section 21;
Thence south 23 degrees west 240 poles;
Thence south 67 degrees east 160 poles to the east line of Section 28;
Thence north 23 degrees east 80 poles to the north east corner of Section 28;
Thence south 67 degrees east 160 poles to the middle line of Section 22;
Thence north 23 degrees east 160 poles to the centre of Section 22;
Thence south 67 degrees east 160 poles to the east line of Section 22;
Thence south 23 degrees west 160 poles to the north west corner of Section 26;
Thence south 67 degrees east 160 poles to the middle line of Section 26;
Thence south 23 degrees west 200 poles;
Thence north 67 degrees west 160 poles to the west line of Section 26—
Thence south 23 degrees west 360 poles to the middle line of the South East quarter of Section 34—
Thence north 67 degrees west 160 poles;
Thence north 23 degrees east 80 poles to the centre of Section 34;
Thence north 67 degrees west 80 poles;
Thence north 23 degrees east 320 poles;
Thence north 67 degrees west 80 poles—
Thence south 23 degrees west 80 poles;
Thence north 67 degrees west 160 poles;
Thence north 23 degrees east to Hopper Branch;
Thence down and with Hopper Branch to the Hiwassee river;
Thence to the middle of the river;
Thence up and with the middle of the river to the north line of Section 33;
Thence south 67 degrees east to north and south middle line of Section 33—
Thence south 23 degrees west 320 poles to the south line of Section 33—
Thence south 67 degrees east 160 poles to the north east corner of Section 4 of Town. 1 of Range 3 East—
Thence south 23 degrees west 320 poles to the south east corner of Section 4—
Thence south 67 degrees east 160 poles to the middle line of Section 10—
Thence south 23 degrees west 400 poles;
Thence north 67 degrees west 80 poles;
Thence south 23 degrees west 240 poles;

Thence north 67 degrees west 80 poles to the south west corner of Section 15—
Thence north 23 degrees east 320 poles to the north west corner of Section 15—
Thence north 67 degrees west 320 poles to the north east corner of Section 17—
Thence south 23 degrees west 320 poles to the south east corner of Section 17;
6 Thence north 67 degrees west 640 poles to the south west corner of Section 18;
Thence north 23 degrees east four miles to the north west corner of Section 31 of Fractional Township 2 North of Range 3 East;
Thence north 67 degrees west 160 poles to the quarter section corner;
Thence south 23 degrees west 160 poles to the centre of Section 36 of Fractional Township 1 North of Range 2 East;
Thence north 67 degrees west 80 poles;
Thence north 23 degrees east 800 poles;
Thence north 67 degrees west 240 poles to the middle line of Section 35;
Thence north 23 degrees east to the centre of main stream Hiwassee river;
Thence down and with the middle of the river to the middle line of Section 10 of Fractional Town. 1 South of Range 1 West of the Hiwassee District Survey;
Thence west through the middle of Sections 10 and 9 to Conasauga Creek;
Thence up and with the creek to the first crossing of the north line of south east quarter of Section 34;
Thence east with the quarter section line to the second crossing of the creek;
Thence up and with the creek to the Polk and McMinn County line;
Thence east with the county line to the beginning—
Excepting out of said descriptions eighty acres, the South half of North East Quarter of Section 30 of Fractional Township 2 North of Range 3 East; 160 acres the South East quarter of Section 7, of Town 1 of Range 3 East—and that part of the South East quarter of Section 4 of Fractional Township 1 South of Range 1 West of Hiwassee District Survey, lying south of old River Road from Calhoun;
Containing, after exceptions above, about 21,000 acres;
7 and also the following lands in said Polk County:

Fractional Town. 2 *North, Range* 2 *East.*.

South half of Section 24—
North half and South west quarter of Section 25—
North East quarter of Section 35—
West half of Section 36—
One-half undivided interest in west half and south east forty acres of South East Quarter of Section 36—

Town. 1, *Range* 2 *East.*

Section 1—
East half of Section 2 except north west forty acres of North East Quarter—
North East quarter of Section 11—
East half of Section 12—
North East quarter of Section 13—

Fractional Township 2 *North, Range* 3 *East.*

South East quarter and east half of South west quarter of Section 2 and the north west forty acres of the North East quarter of Section 11, Sexton land;
North east quarter of Section 23—
East half of Section 24—
East half and south west quarter of Section 25—
East half of Section 36—
South half of South west quarter of Section 36—
North west quarter of Section 36—
The south east quarter of Section 35—
A part of Sections 26 and 35 described as follows—beginning at the south east corner of North East quarter of Section 35 North 67 degrees west to the top of the Lindner Ridge; thence northeast with the top of the Lindner Ridge to the east line of Section 26; thence south 23 degrees west with section line to the beginning.

Town. 1, *Range* 3 *East.*

North half of Section 1 south of Hiwassee river;
Section 19—
North half and south east quarter of Section 20—
8 West half of Section 21—
All of Sections 29 and 30—
West half and south east quarter of Section 31—
West half of Section 32 and North half and south west forty acres of North East quarter of said Section 32, and the north half and south west forty acres of the South East Quarter of Section 32—
North West forty of North East quarter of Section 33—

Town. 1, *Range* 4 *East.*

South half of Section 30, and North half of Section 31—Amounting to 9,745 acres, which together with the Farm first above described, makes in all about 30,765 acres.

9 III.

Your orator shows that there are at this time on his said lands several thousand acres of cleared farming land giving employment to hundreds of persons in farming, and the fear of injury from the said

operations of defendants has made it difficult to carry on, promote and increase the farming operations. That the farming interests have gone down under the damage done and the fear of more injuries in the spreading zone of deadly injury caused by said operations of defendants. This depression and dread caused by the said operations, has checked the growth of the country not only on the large area owned by complainant, but has been an injury and burden on the entire community.

That all of the land aforesaid except about two thousand acres in farms, has been at all times herein mentioned and is now devoted to forestry, and contains in every part and portion thereof forests of chestnut oak, white pine, hickory, poplar, yellow pine, post oak and chestnut, as well as other varieties of trees. The forests aforesaid have been and are being held and employed by your orator for the production of timber and other forest products and such farming and other uses as they may be fit for.

That the whole region not only possesses the finest of climate, of water and other advantages for homes, but the farming lands are now of great value and increasing value as farms. That from the region owners of small farms have been driven away by fear of the said fumes called locally "Smoke" and all values and social and business life interfered with.

Your orator shows that the forests and timber and bark held and owned by the complainant on the lands hereinbefore mentioned are of the most extensive character and of the greatest value. That the supply of lumber, timber and bark furnished and to be secured from said lands is in the absence of the dangers threatened and damage done by the defendants as herein set forth ample to afford a continuous supply of lumber and bark in extremely large quantities for an indefinite period in the future. Said lands contain forests and trees in various stages of maturity. On the same existed and still exist forests and trees that have already matured and reached a development that permits of the cutting and milling of timber and the cutting of bark on a large and profitable scale; other forests and trees on said lands are immature and must be permitted to grow and develop in order to fit them for purpose for which they are owned and held as above set forth. Throughout the holdings of complainant, forests and trees in all stages of growth and development are to be found, and each class requires and receives such attention and treatment as serves not only the present advantage of your orator but the future needs of forestry and the timber and farming and all other industries.

The plan of the complainant pursued by him in the possession and use of the lands aforesaid has been and is to cut only such trees as have reached a growth of not less than fourteen inches in diameter or larger, and to leave the younger and smaller trees to mature and supply future wants. By this method the forests contained in the lands of complainant will if protected from the wrongs herein complained of, never become denuded or destroyed; the condition being that as the old trees and timber are cut away, the younger trees and timber

mature more rapidly, and in turn become ready for the mill and commerce.

IV.

Your orator states that without the acts herein complained of, the lands of complainant amounted in value to a sum approach-
11 ing $500,000.00; that the damage heretofore done by defend-ants to complainant's lands will reach a sum in excess of $150,000.00 so that complainant still owns and holds lands within the district herein described aggregating in value several hundred thousand dollars.

V.

The defendants Ducktown Sulphur Copper & Iron Company Limited, and the Tennessee Copper Company are now and have been for some time prior to the filing of this bill engaged in mining, roasting, producing, smelting, manufacturing and producing sulphur and copper ores and products in Polk County, Tennessee, in close proximity to each other, within a short distance of the lands of this complai.. it, as hereinabove described. Said defendants in the conduct of their said business for the roasting and reduction of copper and sulphur ores, have each recently erected or caused to be constructed, and now own, operate and control a number of furnaces, smelters and ovens, and in close proximity to one another, and upon the lands owned or leased and possessed by the defendants respectively. All of said lands and operations of defendants are situated in said Polk County in the State of Tennessee, and wholly within the jurisdiction of this Honorable Court. Your orator shows that by reason of his ownership of the lands and forests aforesaid and appurtenant thereto, your orator both in law and in equity is possessed likewise of a right and claim in, to and against the lands and tenements of the defendants in the nature of an easement thereupon that the same shall not be used in a manner to injure or destroy the said lands and forests of your orator, adjacent thereto as aforesaid. But the defendants by means of said furnaces, smelters and ovens maintained by them and upon their lands as aforesaid, and in other ways, are, and for some time past have been, generating and causing
12 to be discharged into the atmosphere, vast quantities of smoke, sulphur fumes and noxious and poisonous vapors and gases and other deleterious substances. Within an short distance from the works and property of the defendants the said smokes, fumes, vapors and gases and other deleterious substances so generated by each respectively inextricably mingle and are together discharged upon the lands and forests and trees of your orator, and as a result thereof great damage has been done and injury is threatened as hereinafter appears.

VI.

Said *some,* fumes, gases and vapors have destroyed a considerable portion of the forests and trees and fruit trees owned by and on the land of your orator, and unless relief be granted as herein prayed, the entire holdings of the complainant will be destroyed and his prop-

erty will be rendered valueless. The smoke, fumes, gases and vapors as aforesaid have descended upon the forests and trees of your orator, and within a short time after such contact the trees are killed and the timber ruined. The destruction aforesaid has included and threatens to include forests and trees of every variety and species, and in every stage of growth and development, and is extending to farming crops of every description.

VII.

Your orator shows that the zone of destruction created and produced by the defendants is constantly increasing in extent, and the number of forests and trees owned by complainant and destroyed and threatened with destruction by defendants is continually growing larger, and the injury to crops and farm products, orchards and fruits and even the flowering plants which make homes attractive, increasing and more imminently threatened.

Your orator shows that the taller trees serve to protect the smaller growth, and have been and are the first to suffer damage and death.

Further that forests and trees of the same sort and size are not
13 equally affected, as the same vary in their power to resist the ruinous effect of the fumes, smoke, gases and vapors aforesaid. That the hillsides nearer the works, so long as the trees stand, hinder the damage beyond, but as the nearer trees are killed the zone of injury increases.

The zone of destruction produced by defendants has increased and is increasing in extent, due to the fact that the death of trees already brought about by the conduct of defendants, permit the smoke, fumes, gases and vapors aforesaid to travel farther before being absorbed, and in addition the quantity of ores smelted and handled by the defendants is constantly increasing, so that larger and more ruinous volumes of smoke, fumes, gases and vapors are produced.

VIII.

Your orator states that the operations of defendants as aforesaid have already destroyed on lands and holdings of complainant, forests and timber that would have made good lumber and railroad ties. In addition there have been destroyed trees from which vast amounts of tan bark could and would have been produced. In addition there have been destroyed under conditions stated trees of younger growth, which were and would be valuable when permitted to mature and reach the size requisite for the cutting of timber and bark.

Your orator shows that *at* the death of trees under the circumstances herein set forth, has been and will be so rapid that the timber killed cannot be utilized for any purpose of trade or commerce, and have been and will be a total loss to complainants.

Your orator shows that he is now threatened with the future death and destruction of the forests and trees remaining upon his said lands. That the operations of defendants if permitted to exist as now conducted, and threatened to and will be conducted unless

relief herein be granted, will destroy all of the forests held
14 and owned by complainant. Further, there is threatened with destruction and will be destroyed as aforesaid, the younger growth of forests and trees belonging to complainant, and which are of the value exceeding $50,000.00 as a source of future supplies of forest products.

IX.

Your orator further shows that the smoke, fumes, gases and vapors generated by the defendants and discharged on the property of the complainant, destroy in addition to the forests and trees aforesaid, all other forms of plant and tree life, including vegetable, crop, grasses and orchards. That by the destruction of said trees and vegetation the soil loses all humus, moisture and compactness, and has been in part and will be, washed away by the rains. That in such way a portion of the lands of complainant has been rendered unfit for tree and plant life, and unless redress be secured in this action, the remaining part of the lands held by your orators will be rendered bare and barren, the floods more sudden and greater and the periods of drouth more severe.

X.

Your orator shows that the smoke, fumes, gases and vapors produced by defendants and thrown upon and diffused over the lands of the complainant, are unwholesome and unpleasant to the life and health of all persons coming in contact therewith. That said smoke, fumes, gases and vapors, poison the atmosphere existing over and upon the premises and property of the complainant and render the same unfit for occupation by persons attempting to live or be upon said premises.

XI.

Your orator shows to the court that for the damage and injuries now threatened to be done to complainant by the defendants
15 on account of matters hereinbefore set forth, your orator is without remedy in a court of law; and unless relief be granted as herein prayed, your orator shall suffer irreparable damage and injury.

Your orator shows to the court that it is impossible to estimate or establish the value of the young and immature forests and trees existing in vast abundance on the property of complainant. That the purposes for which said forests and trees are held, and the conditions surrounding the same, are of such character as places beyond the power of any court or person a calculation or approximation of the harm and hurt threatened to be done by the defendants to the complainant. That an injunction to prevent the perpetration of said wrongs is the only adequate relief that complainant can secure.

XII.

Your orator states that the attention of the defendants has frequently been called to the damage done and threatened to be done

the complainant, and demand has repeatedly been made that they abate the nuisance of which they have been and are guilty.

Your orator shows that the defendants have not in any way respected the demand as aforesaid except by vague and unfulfilled promises to abate the nuisance, but on the contrary, have enlarged their operations, and increased the smoke, fumes, vapors and gases generated by them and thrown by them on the lands of the complainant; in consequence of which, the damage and injury done and threatened to be done complainant, has constantly increased and is constantly increasing.

XIII.

Complainant further charges that the damage done to complainant's lands as aforesaid, by the Ducktown Sulphur Copper and Iron Company Limited, for which complainant seeks redress exceeds in amount the sum of Five Thousand Dollars, and that the injury threatened to complainant's lands by the Ducktown Sulphur
16 Copper and Iron Company to prevent which this suit is brought exceeds in value the amount of Five Thousand Dollars.

That the damage done as aforesaid to complainant's lands by the Tennessee Copper Company exceeds the amount of Five Thousand Dollars and that the injury threatened to complainant's lands by the Tennessee Copper Company to prevent which this suit is brought exceeds in value the amount of Five Thousand Dollars.

XIV.

In consideration whereof, and for as much as your orator is remediless in the premises, and can have no adequate relief, except in this court; and to the end, therefore, that the defendants may, if they can, show why your orator should not have the relief prayed, and to the end that defendants may make full, true and direct answer to the matters hereinbefore stated and charged, but not under oath, answer under oath being expressly waived, and to the end that the right and claim of your orator as aforesaid to and upon said properties of the defendants, that the same shall not be used by them in a manner to destroy or injure the lands and forests of your orator, may be declared and enforced, and that the nuisance now maintained as aforesaid, upon the said properties of the defendants may be abated by and under the direction of this Honorable Court, through its own officers or otherwise as it shall seem suitable and right; and that such changes shall be made by and under its direction in and to the properties of the defendants as shall prevent the discharge therefrom upon the lands and forests of your orator of the poisonous smoke, gases, vapor and other deleterious substances hereinbefore complained of; and to the end that the defendants and each of them, their officers, servants and employees may be restrained by injunction issuing out of this court from doing, causing, directing, or in any manner aiding or abetting the acts
17 hereinbefore complained of, or their continuance; your orator prays &c. that your Honors may grant a writ of injunction

properly restraining and enjoining the defendants and each of them, their officers, agents, servants and employees from maintaining, operating, directing or permitting upon their land or premises the operation or maintenance of any oven, roast heap, pit, furnace or appliance generating or giving forth any of the smoke, gases, fumes, or vapors hereinbefore complained of, or otherwise generating, producing or causing any foul or dense or copper or sulphurous smoke, or any noxious, poisonous, unhealthy or disagreeable, or in any manner, injurious vapor, gas, fume, or odor upon the territory or lands of your orator.

Your orator further prays that your Honors grant unto your orator a writ of Injunction commanding the said defendants, the Ducktown Sulphur Copper & Iron Company Limited and the Tennessee Copper Company and each of them their agents, servants, employees and confederates, and all persons acting under their authority or control or direction, or under the direction, authoity or control of either of them, to absolutely desist and refrain from using, managing, maintaining, or in any manner operating any furnace, pit, oven, or other appliance or copper reducing method causing, generating, giving off or discharging any dense or foul smoke, or poisonous, noxious, unwholesome or unpleasant gas, vapor, odor, or fume, and from the diffusing of any foul or dense smoke, or poisonous, noxious, unwholesome or unpleasant gas, vapor, odor or fume upon the territory or lands of your orator or from the generating, causing, or diffusing any foul or dense smoke or any gas, vapor, odor, or fume, damaging or destroying or injuring the property of your orator or causing or producing any physical or bodily harm injury discomfort inconvenience to persons on or near the property
18 and premises of your orator, or depriving your orator of pure air and sunlight until such time as your Honors shall direct herein; and that upon the hearing hereof the writ herein prayed for be made and confirmed until the final determination of this suit and that thereupon the injunction herein asked be made perpetual.

Your orator further prays for such other and further relief herein as may to the Court seem meet and proper.

May it please your Honors to grant unto your orator not only a writ of Injunction conformable with the prayer of this bill but a writ of subpœna issuing out of and under the seal of this Honorable Court directed to the defendants the Ducktown Sulphur Copper and Iron Company Limited and the Tennessee Copper Company their Officers, Trustees and Agents commanding them and each of them under a certain penalty to be therein inserted on a day certain to be and appear and answer (but not under oath) to this bill of complaint and to further stand to and abide such orders and decree as shall be made here agreeable to equity and good conscience, and your orator will ever pray &c.

GEORGE PEABODY WETMORE,
By CHARLES SEYMOUR, *Att'y.*

C. H. SHIELD,
Of Counsel.
CHARLES SEYMOUR, *Solicitor.*

19 UNITED STATES OF AMERICA,
Eastern District of Tennessee:

On this the 24th day of April 1909 before me personally appeared Charles Seymour who made oath and says that he is the Agent and Solicitor of the above named complainant, that he has read the foregoing bill of complaint subscribed by him as solicitor and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated on information and belief and as to those matters he believes it to be true.

CHARLES SEYMOUR.

Subscribed and sworn to before me this 24th day of April 1909.

NORMAN B. MORRELL,
[SEAL.] *Notary Public, Knox County, Tenn.*

20 UNITED STATES OF AMERICA,
Southern Division of the Eastern District of Tennessee, ss:

The President of the United States of America to the Marshal of the Eastern District of Tennessee, Greeting:

You are hereby commanded to summon Ducktown Sulphur, Copper & Iron Co., Limited, and Tennessee Copper Co. if to be found in your District, to be and appear in the Circuit Court of the United States for the Eastern District of Tennessee, aforesaid, at Chattanooga, on the Fourth Monday in May next, to answer a certain bill in Chancery, filed and exhibited in said Court against them by George Peabody Wetmore.

Hereof you are not to fail under penalty of the law thence ensuing. And have you then and there this writ:

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, this 26 day of April A. D. 1909 and the 133 year of the Independence of the United States of America.

Attest:

R. F. McCLURE,
Deputy Clerk.

MEMORANDUM.—The said defendants are required to enter their appearance in this suit in the Clerk's office of said Court on or before the Fourth Monday of May 1909 otherwise the said bill may be taken pro confesso.

R. F. McCLURE,
Deputy Clerk.

Received at Athens, Tenn. May 11th. 1909. Executed May 12, 1909, at Farner, Tenn., as to Tennessee Copper Co. by leaving copy of original complaint and of the within with N. H. Clemmons, Acting General Manager of Tennessee Copper Co. at Copper Hill, Polk Co. Tenn., he being the highest official of said corporation to be found in my District. Executed as to Ducktown Sulphur,
21 Copper & Iron Co., Limited, by leaving a copy of original complaint and a copy of within with W. H. Freeland, Gen.

Manager of the Ducktown Sulphur Copper & Iron Co., Ltd., at Isabella, Polk Co. Tenn., on May 13th, 1909, he being the highest official of said corporation to be found in my district.

This May 12th, 1909.

S. M. WELCH, *D. M.*

Endorsed: No. 1047—Circuit Court of U. S.—George Peabody Wetmore vs. Ducktown Sulphur Copper & Iron Co. et al.—Filed May 18, 1909—D. L. Snodgrass, Clerk—R. F. McClure, Deputy—Chancery Subpœna, Issued April 26, 1909. R. F. McClure, Deputy Clerk Polk Co.

22 In the Circuit Court of the United States for the Eastern District of Tennessee, Southern Division.

No. 1047. In Equity.

GEORGE PEABODY WETMORE
vs.
DUCKTOWN SULPHUR, COPPER & IRON CO. (LTD.) and TENNESSEE COPPER CO.

Special Appearance of Tennessee Copper Company.

Now comes the defendant Tennessee Copper Co., by its counsel, and enters its appearance herein under protest for the special and single purpose of objecting to the jurisdiction of this Court and for no other purpose.

CORNICK, WRIGHT & FRANTZ,
Attorneys for Defendant Tennessee Copper Co.

This May 25, 1909.

Endorsed: No. 1047—In the U. S. Circuit Court at Chattanooga. Geo. Peabody Wetmore vs. Ducktown S. C. & I. Co. Special Appearance of Tennessee Copper Co. Filed 26 day of May, 1909—D. L. Snodgrass, Clerk. R. F. McClure, Deputy C.

23 In the Circuit Court of the United States for the Eastern District of Tennessee, Southern Division.

No. 1047. In Equity.

GEORGE PEABODY WETMORE
vs.
DUCKTOWN SULPHUR, COPPER & IRON CO. (LTD.) and TENNESSEE COPPER COMPANY.

Motion to Dismiss.

Comes the Tennessee Copper Co., one of the above named defendants, which has entered its special appearance herein under protest,

for the special and single purpose of objecting to the jurisdiction of this Court, and for no other purpose, and moves the Court to dismiss the bill filed in this cause on April 26th, 1909, for the following reasons:

1.

Because it appears upon the face of said bill, that the complainant, George Peabody Wetmore, is now and was at the time of the filing of said bill, a citizen and resident of the State of Rhode Island, and that complainant was not and is not a citizen or resident of the Eastern District of Tennessee, and further it appears upon the face of said bill that this defendant, Tennessee Copper Co., is now and was at the time of the filing of said bill, a citizen and resident of the State of New Jersey, and was not and is not a citizen or resident of the Eastern District of Tennessee, while the suit herein is brought in the Eastern District of Tennessee, Southern
24 Division. Wherefore, it appears upon the face of said bill that this Court has no jurisdiction of the parties to this suit under an Act of Congress conferring jurisdiction upon the Circuit Courts of the United States, which Act contains the following provisions to wit:

"No civil suit shall be brought before either of said Courts (Circuit Court or District Court) against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different States suit shall be brought only in the District of the residence of either the plaintiff or the defendant."

Wherefore, and for reasons appearing upon the face of complainant's bill, this defendant moves that this suit be dismissed as to this defendant.

TENNESSEE COPPER COMPANY,
By HOWARD CORNICK, *Att'y.*

CORNICK, WRIGHT & FRANTZ, *Sols.*

Endorsed: No. 1047—In the U. S. Circuit Court at Chattanooga, Geo. Peabody Wetmore vs. Ducktown S. C. & I. Co. et al.—Motion to Dismiss—Filed 26 day of May, 1909—D. L. Snodgrass, Clerk, R. F. McClure, D. Clerk.

25 In the U. S. Court at Chattanooga, Tennessee.

1047. In Equity.

GEORGE PEABODY WETMORE
vs.
DUCKTOWN SULPHUR, COPPER & IRON CO., LTD., et al.

Special Appearance of Ducktown Sulphur, Copper & Iron Co., Ltd.

Comes defendant Ducktown Sulphur Copper & Iron Co., Limited, by its attorney and solicitor, and enters its appearance for the special

purpose of entering a motion to dismiss complainant's bill for want of jurisdiction appearing on the face of the bill, and for misjoinder of parties defendant, but for no other purpose.

This June 18th, 1909.

DUCKTOWN SULPHUR, COPPER & IRON CO., LTD.,
By BURKETT, MILLER & MOORE,
Attorney- & Solicitor.

Endorsed: No. 1047. In the U. S. Circuit Court at Chattanooga. Geo. Peabody Wetmore vs. Ducktown S. C. & I. Co. et al.—Special Appearance of D. S. C. & I. Co. Filed 18th day of June, 1909—R. F. McClure, D. Clerk.

26 In U. S. Court at Chattanooga, Tennessee.

1047. In Equity.

GEORGE PEABODY WETMORE
vs.
DUCKTOWN SULPHUR, COPPER & IRON CO., LTD., et al.

Motion to Dismiss.

The Ducktown Sulphur Copper & Iron Co., Ltd., a defendant in above cause, having entered its special appearance only for the purpose of this motion, now comes and moves the Court to dismiss the bill filed herein for reasons following:

1.

Because of misjoinder of parties (1) as under the facts averred a joint action against this defendant and its co-defendant cannot be maintained; and (2) also because its co-defendant is not suable by complainant in this Court, whereas, in a joint action both defendants must be competent as such and capable of being sued.

Wherefore, this defendant moves that the bill be dismissed as to it.

DUCKTOWN SULPHUR, COPPER & IRON CO., LTD.,
By BURKETT, MILLER & MOORE,
Attorneys and Solicitors.

Endorsed: No. 1047—Geo. P. Wetmore vs. Ducktown S. C. & I. Co. et al.—Motion to Dismiss—Filed 18th day of June, 1909—R. F. McClure, D. Clerk.

27 United States Circuit Court for the Eastern District of Tennessee, Southern Division.

No. 1047.

GEORGE PEABODY WETMORE, Complainant,
vs.
DUCKTOWN SULPHUR, COPPER & IRON CO., LTD., TENNESSEE COPPER COMPANY, Defendants.

Decree.

In this case the original bill was filed April 24th, 1909,

The defendants Ducktown Sulphur Copper & Iron Co., Ltd., and Tennessee Copper Co. severally entered their special appearances for the sole purpose of objecting to the jurisdiction of the Court and moved the Court to dismiss the bill on the ground that this court has no jurisdiction herein and as the questions involved in the motions to dismiss were the same as those in cause No. 1012—Ladew et al. vs. both companies—this cause was continued to abide the decision in said case and the opinion rendered in No. 1012 was by agreement to apply in this cause No. 1047; and thereafter, on February 16th, 1910, the Court being advised rendered an opinion in writing now in the record in cause No. 1012 and a supplemental opinion as to costs on March 14th, 1910, and deciding as below decreed.

Pursuant to the opinions aforesaid it is now ordered, adjudged and decreed as follows:

In so far as the defendant Tennessee Copper Co. is concerned this Court has no jurisdiction over the person of said defendant and the motion of the said Tennessee Copper Co. to dismiss said bill of complaint for want of jurisdiction is sustained, and this action is dismissed for want of jurisdiction as to the defendant Tennessee
28 Copper Co. The plaintiffs will pay all costs incident to making said defendant a party, for which execution will issue.

In so far as the defendant Ducktown Sulphur Copper & Iron Co., Ltd., is concerned, this Court has jurisdiction of the cause set forth in the bill of complaint herein, and the motion to dismiss the bill of complaint for want of jurisdiction as entered by the said Ducktown Sulphur Copper & Iron Co., Ltd., is overruled, to which it excepts. Ordered and decreed this March 18, 1910.

SANFORD, *Judge.*

O. K.
W. B. MILLER,
Att'y for D. S., C. & I. Co.

No exceptions.
HOWARD CORNICK,
Att'y for T. C. Co.

Endorsed: No. 1047—Geo. Peabody Wetmore vs. Tennessee Copper Co. Decree filed March 18, 1910—D. L. Snodgrass, Clerk.

29 United States Circuit Court for the Eastern District of Tennessee, Southern Division.

No. 1047.

GEORGE PEABODY WETMORE, Complainant,
vs.
DUCKTOWN SULPHUR, COPPER & IRON CO., LTD., TENNESSEE COPPER CO., Defendants.

Petition for Appeal.

The complain-t above named George Peabody Wetmore conceiving himself aggrieved by the final decree, order and judgement in this cause rendered on March 18th, 1910, dismissing this action as to the defendant Tennessee Copper Co. does hereby appeal from so much of final decree or order as adjudges and decrees that this Court has no jurisdiction of the action as instituted against said defendant Tennessee Copper Co., and dismisses the bill of complaint as to said defendant. The complainant aforesaid prays that an appeal to the Supreme Court of the United States may be allowed and that a transcript of the record, proceedings and papers upon which the final decree, order and judgment aforesaid were made, duly authenticated, may be sent to said Supreme Court of the United States. With this petition for appeal the complainant aforesaid, as appellant files an assignment of errors, setting forth such error or errors as are intended to be urged in the Supreme Court of the United States on appeal, and your petitioner will ever pray.

CHARLES SEYMOUR,
Sol. for Petitioner.

H. B. CLOSSON,
52 *Williams St., New York,*
CHARLES H. SHIELD,
BENJ. F. WASHER,
Louisville, Ky.,
Counsel for Compl't.

Endorsed: No. 1047—Geo. P. Wetmore vs. Tennessee Copper Co.—Petition for Appeal. Filed March 18, 1910. D. L. Snodgrass, Clerk.

30 United States Circuit Court for the Eastern District of Tennessee, Southern Division.

No. 1047.

GEORGE PEABODY WETMORE, Complainant,
vs.
DUCKTOWN SULPHUR, COPPER & IRON CO., LTD., TENNESSEE COPPER CO., Defendants.

Assignment of Errors.

The complainant above named in connection with his petition for appeal makes the following assignment of errors to be urged by him in the Supreme Court of the United States on appeal:

(1) The Court erred in its finding and ruling that the defendant Tennessee Copper Co., was not properly or at all before this Court by the service of process herein, for all purposes of relief and remedy as set forth in the bill of complaint.

(2) The Court erred in its ruling that the United States Circuit Court for the Eastern District of Tennessee, Southern Division, was not and is not, possessed of jurisdiction in this cause as to the defendant, Tennessee Copper Co.

(3) The Court erred in ordering the bill of complaint dismissed as to the defendant, Tennessee Copper Co.

CHERLES SEYMOUR, *Solicitor.*

H. B. CLOSSON,
52 Williams St., New York,
CHARLES SHIELD,
BENJ. F. WASHER,
Louisville, Ky.,
Counsel for Compl't.

Endorsed: No. 1047—Geo. P. Wetmore vs. Tennessee Copper Co. Assignment of Errors—Filed March 18, 1910. D. L. Snodgrass, Clerk.

31 The United States Circuit Court for the Eastern District of Tennessee, Southern Division.

Know all men by these presents, That we, George Peabody Wetmore, as principal, and, American Surety Company of New York as surety, are held and firmly bound unto the defendant, in error, Tennessee Copper Co., in the full and just sum of Five Hundred Dollars to be paid to the said defendant, Tennessee Copper Co., or its certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 18th day of March in the year of our Lord One thousand nine hundred and ten.

Whereas lately at a Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee, in a suit depending in said Court between Geo. Peabody Wetmore, plaintiff and Tennessee Copper Co. defendant, a judgement was rendered against the said Geo. Peabody Wetmore and the said Geo. Peabody Wetmore having obtained a writ of error and filed a copy thereof in the Clerk's office of said Court to reverse the judgement in the aforesaid suit and a citation directed to the Tennessee Copper Co. citing and admonishing it to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington on the 11th day of April next.

Now, the condition of the above obligation is such that if the said Geo. Peabody Wetmore shall prosecute said writ of error to effect and answer all damages and costs if he — make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of

GEORGE PEABODY WETMORE, [SEAL.]
By CHARLES SEYMOUR, *Att'y.*
AMERICAN SURETY CO. OF NEW YORK, [SEAL.]
By H. D. HUFFAKER, *Res. V.-P.*
Attest: WM. T. COOPER. *Res. Ass't Sec'y.*

Approved by
EDWARD T. SANFORD,
District Judge, Holding the Circuit Court.

Endorsed: No. 1047—Geo. Peabody Wetmore vs. Tennessee Copper Co.—Bond. Filed March 18, 1910. D. L. Snodgrass, Clerk.

32 In the Circuit Court of the United States, Eastern District of Tennessee, Southern Division.

No. 1047. In Equity.

GEORGE PEABODY WETMORE
v.
TENNESSEE COPPER COMPANY.

In this cause I hereby certify that the decree of dismissal herein made as to the defendant Tennessee Copper Company is based solely on the want of jurisdiction of the person of the defendant, on the ground that under the record in this cause the jurisdiction of a Circuit Court of the United States of the controversy between the complainant and said defendant can be founded only on the fact that such controversy is between citizens of different States, and that as neither the complainant nor said defendant reside in this district and the said defendant has not waived the want of jurisdiction in the Circuit Court of this district, this suit cannot be brought against it in

this court and no jurisdiction of its person has been acquired by the proceedings herein.

This certificate is made conformably to section 5 of the Act of Congress of March 3, 1891, chapter 517, and the opinions in the case of J. Harvey Ladew et al. v. Tennessee Copper Company et al. referred to in the said decree of dismissal are made a part of the record and will be certified and sent up as part of the proceedings, together with this certificate.

Dated this 18th day of March, A. D., 1910.

EDWARD T. SANFORD,
District Judge, Holding the Circuit Court of the United States for the Eastern District of Tennessee.

[Endorsed:] No. 1047—12 (5) Geo. Peabody Wetmore vs. The Tenn. Copper Co. Certificate of Judge. Filed March 18, 1910. D. L. Snodgrass, Clerk.

33 United States Circuit Court for the Eastern District of Tennessee, Southern Division.

No. 1047.

GEORGE PEABODY WETMORE, Complainant,
vs.
DUCKTOWN SULPHUR, COPPER & IRON CO., LTD., TENNESSEE COPPER CO., Defendants.

Order Allowing Appeal.

The complainant George Peabody Wetmore having filed his petition for appeal from the final decree of this Court dismissing the bill of complaint as to the defendant, Tennessee Copper Co., and the Court being advised it is ordered that the appeal to the Supreme Court of the United States as asked in the petition aforesaid be and the same is allowed on the plaintiff giving bond as required by law in the sum of five hundred dollars. The Clerk is directed to prepare a transcript of the record proceedings and papers upon which the final decree aforesaid was made, and after due authentication of the same, such transcript shall at once be transmitted to the Supreme Court of the United States. This March 18th 1910.

EDWARD T. SANFORD,
District Judge, Holding the Circuit Court.

Endorsed: No. 1047—George Peabody Wetmore — Tenn. Copper Co. Order Allowing Appeal—Filed March 18, 1910. D. L. Snodgrass, Clerk.

34 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Tennessee Copper Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the city of Washington on Monday the 11th day of April 1910 pursuant to an appeal duly allowed by the Circuit Court for the Southern Division of the Eastern District of Tennessee and filed in the Clerk's office of said Court on the 18th day of March A. D. 1910; in a cause wherein George Peabody Wetmore is appellant and you are appellee, to show cause, if any, why the decree rendered against the said appellant as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the party in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States this 18th day of March A. D. 1910.

EDWARD T. SANFORD,
District Judge, Holding the Circuit Court.

Service of a copy of the within citation is hereby admitted this 19th day of March A. D. 1910.

HOWARD CORNICK,
Attorney for Appellee.

35 In the United States Circuit Court at Chattanooga.

No. 1012. In Equity.

J. HARVEY LADEW et al.
v.
TENNESSEE COPPER CO. et al.

Opinion on the Defendant's Motion to Dismiss the Bill.

This bill was filed by the complainants, citizens and residents of the States of New York and West Virginia, against the Tennessee Copper Company, a corporation of the State of New Jersey, and the Ducktown Sulphur, Copper & Iron Company, Ltd., a corporation of the Kingdom of Great Britain, each having its main office and business in Polk County, Tennessee, within this judicial district.

The bill alleges that the complainants are the joint owners of certain tracts of forest lands and timber rights in the State of Georgia, containing altogether twenty four thousand acres and timber aggregating in value many thousands of dollars; that the defendants are engaged in mining and manufacturing sulphur and copper ores in Polk County, Tennessee, near the Georgia State line, within a short distance, of complainants' property, and have erected and are operating furnaces, smelters and ovens for roasting and reducing such ores, in close proximity to one another, upon

lands in Polk County, Tennessee, owned or leased by them, respectively; that "by reason of their ownership of the lands and forests aforesaid," complainants "both in law and equity are possessed of a right and claim in, to and against the lands and tenements of the defendants in the nature of an easement thereupon that same shall not be used in a manner to injure or destroy the said lands
36 and forests of your orators adjacent thereto as aforesaid;" that the defendants by means of said furnaces, smelters and ovens, and in other ways, generate vast quantities of smoke and fumes, which inextricably mingle a short distance from their works and are together discharged upon complainants' lands and forests, and have destroyed much of complainants' forests and inflicted great damage; that the zone of destruction is constantly increasing, and the defendants' operations, if permitted to continue, will destroy all of complainants' forests and timber and other forms of plant and tree life, and render their lands barren, unfit for occupation, and valueless; that it is impossible to calculate or approximate the damage threatened, and the complainants are without remedy in a court of law, and unless relief is granted, will suffer irreparable injury; and that "an injunction to prevent the perpetration of said wrongs is the only adequate relief that complainants can secure."

And "to the end that" the aforesaid right and claim of complainants to and upon the properties of the defendants, that the same shall not be used in a manner to destroy or injure the lands and forests of complainants, may be declared and enforced, and that the nuisance maintained upon said properties may be abated by and under the direction of the court, through its own officers or otherwise, and that such changes be made by and under its direction in and to the defendants' properties as shall prevent the discharge therefrom upon complainants' lands and forests of the aforesaid deleterious substances, and that the defendants may be restrained by injunction from doing or causing the acts complained of, or the continuance, the complainants pray; that writs of injunction be granted restraining and enjoining the defendants, their officers, agents and servants, from maintaining or operating upon their premises any oven, furnace or appliance giving forth any of
37 the smoke and fumes complained of, or otherwise producing or causing any noxious or injurious smoke or fumes upon the complainants' lands, and commanding them to desist and refrain from using, maintaining or operating any furnace or other appliance or copper reducing method giving off or discharging any noxious smoke or fumes upon the complainants' lands; and they further pray for general relief.

By an amendment to the bill, made by leave of the court, complainants further allege that the properties and operations of each defendant constituting the nuisance sought to be abated are of greater value than $5,000.00; that the injury which will be done to complainants' lands by each of the defendants unless the nuisance is abated exceeds in value $5,000.00; and that the matter in controversy, exclusive of interest and costs, exceeds $5,000.00.

Subpœnas to answer were issued, as prayed in the bill, and served

upon the highest officer of each of the defendants to be found within this district.

Motion of the Tennessee Copper Company.

The Tennessee Copper Company, having entered a special appearance for the sole purpose of objecting to the jurisdiction of the court, moved to dismiss the bill on the ground that as it appears upon its face that the complainants are citizens and residents of New York and West Virginia and said defendant a citizen and resident of New Jersey, and that neither the complainants nor said defendant are citizens and residents of the eastern district of Tennessee, this Court has no jurisdiction.

38 It is well settled that a want of jurisdiction apparent on the face of the bill may be taken advantage of by motion to dismiss. Coal Co. v. Blatchford, 11 Wall. 172; Central Trust Co. v. McGeorge, 151 U. S. 129, 132; Connor v. Vicksburg & M. R. Co., (C. C.) 36 Fed. 273; Municipal Inv. Co. v. Gardiner, (C. C.) 62 Fed. 954; Stichtenoth v. Central Exchange, (C. C.) 99 Fed. 1.

It is also clear, as is conceded by the complainants, that as the Act of March 3, 1875, Ch. 137, Sec. 1, as amended by the Act of August 13, 1888, Ch. 866, Sec. 1, 25 Stat. 433, provides that when the jurisdiction of the Circuit Court is founded only on the fact that the parties are citizens of different States, suit shall be brought only in the district where either the plaintiff or the defendant resides, and as neither the complainant nor the Tennessee Copper Company, a New Jersey corporation, are residents of this district, if jurisdiction of this case depends upon diverse citizenship alone, the Circuit Court of this particular district is without jurisdiction, and such want of local jurisdiction not having been waived by said defendant, the suit as to it must be dismissed. Shaw v. Quincy Min. Co., 145 U. S. 444; Southern Pac. Co. v. Denton, 146 U. S. 202; In re Keasbey & Mattison Co., 160 U. S. 221; Western Loan Co. v. Mining Co., 211 U. S. 368.

The complainants contend, however, that jurisdiction of this suit does not depend upon diverse citizenship alone, but that it is an action relating to property which may be brought against said defendant in this district under Section 8 of the Act of March 3, 1875, Ch. 137, 18 Stat. 470, which provides that "when in any suit commenced in any Circuit Court of the United States to enforce any legal or equitable lien upon, or claim to, or to remove any

39 incumbrance or lien or cloud upon the title to real and personal property within the district where such suit is brought," any of the defendants shall not be an inhabitant of, or found within said district, or voluntarily appear, an order directing such absent defendant to appear and make defense may be served on him personally wherever found, or when this is impracticable, by publication, and that in default of such appearance, the court may "entertain jurisdiction, and proceed to the hearing and adjudication of such suit . . .; but said adjudication shall, as regards said absent defendant . . . without appearance, affect only the prop-

erty which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district."

This section of the Act of 1875 was not repealed by the Act of 1888, and remains in full force. Mellen v. Moline Works, 131 U. S. 352; Tellenik v. Huron Copper Co., 177 U. S. 1 1); Citizens Savings Co. v. Ill. C. R. Co., 205 U. S. 46, 54. And when the requisite diversity of citizenship exists to give the Circuit Court jurisdiction a suit embraced within the provisions of this section may be brought within the district in which the property is situated, although neither the plaintiff nor defendant is a resident of such district. Greely v. Lowe, 155 U. S. 58; Citizens Savings Co. v. Ill. C. R. Co., *supra;* Single v. Paper Mfg. Co., (C. C.) 55 Fed. 553; Spencer v. Stock-Yarks Co. (C. C.) 56 Fed. 741.

The present suit does not, however, in my opinion come within the provisions of section 8 of the Act of 1875.

L. It clearly cannot be held to be within the provisions of this section under the broad theory upon which complainants rely that it is purely a local action *in rem* to abate a nuisance, wherein relief may be given without a judgment *in personam* against the defendants, through process of the court executed by its officers and operating directly on the res, and hence as such local action *in rem,* necessarily included within the provisions of said section 8.

In the first place, as the bill does not allege that either of the plants of the defendants, or any particular strictures or appliances therein, constitutes a nuisance *per se,* which should be abated or destroyed under process of the court, but, in effect, merely complains generally of an unlawful use of the defendants' properties by methods of operating their plants which generate and diffuse noxious fumes and smoke over the complainants' properties, and, while it contains an incidental reference to an abatement of the nuisance by officers of the court, on the other hand avers specifically that an injunction to prevent the perpetration of the wrongs is the only adequate relief that complainants can secure, and prays for no specific relief other than an injunction operating upon the defendants *in personam* and restraining them from an improper use of their property, the suit, evidently, is not, under the pleadings, purely an action *in rem* to abate a nuisance, but is , on the contrary, primarily and essentially an action to restrain a nuisance by injunctive relief operating *in personam* upon the defendants. Thus considered, it would follow that if the doctrine of York County Sav. Bank v. Abbot, (C. C.) 139 Fed. 988, 994 a case upon which complainants rely—that no jurisdiction is conferred upon the Circuit Court under section 8 of the Act of 1875 in an action where complete relief cannot be given according to the terms of the bill without a judgment in personam against an absent defendant, be correct, the court would clearly be without jurisdiction of the case.

And if jurisdiction under section 8 of the Act depended upon whether the proceedings were essentially *in rem* or *in personam,* it might well be doubted whether the specific prayer for injunctive

relief against the defendants could be disregarded, and the
41 bill treated for jurisdictional purposes, under its broad averments and prayer for general relief, as merely one to abate a nuisance by process operating *in rem*, as distinguished from a suit to restrain the nuisance by process *in personam*. (See Mississippi & M. R. R. Co. v. Ward, 2 Black, 485; Van Betgen v. Van Bergen, 2 Johns, Ch. 272; Carlisle v. Cooper, 18 N. J. Eq., 241; Ramsay v. Chandler, 3 Col 90; Lassater v. Garrett, 4 Baxt. (Tenn.) 369; 1 Am. & Eng. Enc. of Law, 2nd Ed. 64; 29 Cyc., 1209, 1252; 14 Enc. Pl. & Pr. 1146, 1147).

It is, however, unnecessary to determine this question, since even if the suit could thus be considered, in the aspect most favorable to the complainants, as an action to abate a nuisance under direct process of the court, and hence as purely a local action *in rem*, or in the nature of a proceeding *in rem*, this would not suffice to bring it within the provisions of section 8 of the Act of 1875.

It is clear that this section does not extend either to all suits of a local nature or to all local actions *in rem* or in the nature of proceedings *in rem*, but is definitely limited to suits brought for the enforcement of certain specific rights. The suits which it includes are not described by reference to their general character, but by reference to their object. It contains no general descriptive phrase, such as "suits of a local nature," used in sections 741 and 742 of the Revised Statutes in regard to suits brought in a State having more than one judicial district, or "proceedings *in rem*," or other like phrase; on the contrary it definitely enumerates the suits to which it relates, namely, those brought "to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property." In view of this specific enumeration of the suits to which it relates, and the absence of any general phrase extending its provisions to any other
actions, local or otherwise, its scope cannot be extended by
42 any process of construction, there being nothing in its language upon which such extension can be based.

Where a "statute specifies certain classes of cases which may be brought against non-residents, such specification doubtless operates as a restriction and limitation upon the power of the court." Roller v. Holly, 176 U. S. 398, 406.

2. The question then arises whether, as the complainants further contend, this suit comes within the specific provisions of section 8 of the Act of 1875, as a suit brought to enforce a "claim to . . . property" of the defendants, within the meaning of this section, there being obviously no other class of suits enumerated in this section in which it can be included.

This suit clearly does not come within this provision merely because the complainants allege in their bill that by reason of the ownership of their lands they are "possessed of a right and claim in, to and against the lands and tenements of the defendants in the nature of an easement thereupon," this being the mere assertion of the legal conclusion which the complainants seek to draw from the fact of their ownership of the lands in Georgia; and it cannot be held

to come within this provision unless, upon the facts alleged in the bill, the complainants are seeking to enforce a right which, within the meaning of the Act, may properly be termed a "claim to the property" within this district.

The theory of the complainants is, that attached to all property is a claim, based upon natural right, held by those who occupy any relation with respect thereto, that it shall not be used in such way as to injure or damage such other persons; and that the duty under which the defendants' property rests creates in favor of the complainants a right to and a claim against such property, which "may be called a negative right or easement upon land based upon the maxim of *sic utere tuo ut alienum non laedas*," and is the basis of the present action.

43 There appears to be no direct adjudication upon the question whether a claim of this character may be properly considered a claim to property within the meaning of the statute.

The statement in Shainwald v. Lewis, (D. C.) 5 Fed. 310, 317, that by the words "legal or equitable lien or claim against real or personal property," Congress "intended to reach every case in which there should be any sort of charge upon a specific piece of property, capable of being enforced by a court of equity," which is cited in 1 Rose's Code, Fed. Proc., sec. 856, note C, as authority for a similar statement, was purely *obiter*, the only point involved in the case being that Rev. Stat. sec. 738, in which these words originally occurred, did not apply to a suit in which the plaintiff sought to subject the general property of the defendant to the payment of its debts, but only to suits to enforce some pre-existing lien or claim upon a specific piece of property. Neither is the question controlled by the definition of the word "claim" given by Mr. Justice Story in Prigg v. Pennsylvania, 16 Pet. 536, 615, as "a demand of some matter as of right, made by one person upon another, to do or forbear to do some act or thing as a matter of duty," this definition being given in a case involving the construction of a statute providing that slaves should be delivered up "on claim of the party" to whom their service was due; the meaning of the word "claim" as used in a statute of this character in reference to the "claim of" one person upon another to do a certain thing, being manifestly different from its meaning as used in the Act of 1875 in reference to the claim of one person "to the property of another. Evidently its meaning as used in the Act of 1875 in the phrase a "claim to . . . property," is much more nearly expressed by the next definition cited by Mr. Justice Story in this same opinion, as given by Lord Dyer in Stowel v. Zouch, 1 Plowd. 359, that "a claim is a challenge

44 by a man of the propriety or ownership of a thing, which he has not in possession, but which is wrongfully detained from him."

On the whole I am of the opinion, that as it appears from the concluding portion of this section that it relates entirely to suits of which property is the "subject," and as the words "claim to . . . property" are evidently used in contrast to liens or incumbrances upon property and are the only words in the section under which a

claim to the direct ownership of property may be included, these words relate only to claims made to the property in the nature of an assertion of ownership or proprietary interest, or other direct right or claim to the property itself, such, for example, as the claim of ownership of an undivided interest in the property upon which a suit for partition may be based. (Greely v. Lowe, 155 U. S. 58, 74) and do not include the insertion of a right which is not based upon an interest in the property itself, but seeks merely to enforce a restriction which the law imposes upon the owner of the property in reference to its proper use; and therefore, that a bill to abate or restrain a nuisance is not a suit to enforce a claim to the defendant's property within the meaning of the statute.

"A nuisance is literally an annoyance and signifies in law such a use of property or such a course of conduct as . . . transgresses the just restrictions upon use or conduct which the proximity of other persons or property in civilized communities imposes upon what would otherwise be rightful freedom." 21 A. & Eng. Enc. of Law, 2nd Ed. 682. The right to have a nuisance on another's property restrained or abated is not based upon an assertion of title to such property, or of any proprietary interest there in, or right or claim to the property itself, but is, on the contrary, based solely upon the breach of a personal duty which the owner of the property owes to his neighbor in its management and use; breach of duty which may be punished by indictment where the nuisance is of a public character, and which renders the offender personally liable in damages to the injured neighbor. And therefore the assertion by the neighbor of his right to have the nuisance restrained or abated, being based on the personal wrong and breach of duty on the part of the owner, and seeking merely to enforce the just restrictions which the law imposes upon him in the use of his property and prevent misuse, cannot, in my opinion, be regarded in any just sense as the assertion on the part of the neighbor of a claim to the property itself within the meaning of the statute.

Nor can this result be changed by reason of the fact that as a suit for the abatement of a nuisance is a local action which can only be brought in the district where the nuisance is located, (Mississippi & M. R. R. Co. v. Ward, *supra*), in such a suit between citizens of different States, where neither of the parties reside in the district where the nuisance is located, the action not being maintainable under section 8 of the Act of 1875, there is no jurisdiction in any Circuit Court of the United States except upon a waiver by the defendant of the want of jurisdiction in the particular district.

The construction and interpretation of statutes cannot extend to amendment or legislation. United States v. Fox, 3 Wall. 445, 448; Petri v. Greelman Lumber Co., 199 U. S. 487, 495. Nor can considerations of apparent hardship justify a strained construction of the law as written. Jos. Schlitz Brewing Co. v. United States 181 U. S. 584, 589; St. Louis & I. M. R. Co. v. Taylor, 210 U. S. 281. "The remedy," if any be required, "is in Congress." Ex parte Girard, 3 Wall., Jr. 263, 10 Fed. Cas. 436.

Furthermore the complainants are not on that account remediless; since in this case, as well as in the many other controversies between citizens of different States which Congress has not deemed
46 proper to include within the jurisdiction of the Circuit Courts of the United States, the parties may always rely for the enforcement of their rights upon the State courts having the necessary local jurisdiction.

It results, therefore, that the motion of the Tennessee Copper Company must be granted and the bill dismissed as to it, for want of jurisdiction over the person of the defendant; but without prejudice. Mason Grocery Co. v. Atlantic C. L. R. Co. U. S. Sup. Ct., January 17, 1910, York County Sav. Bank; *York County Sav. Bank* v. Abbot, (C. C.) 139 Fed. 988. And without the adjudication of costs. The Mayor v. Cooper, 6 Wall. 247; Hornthall v. The Collector, 9 Wall. 560; Mansfield C. & L. M. Ry. v. Swann, 111 U. S. 379; York County Sav. Bank v. Abbot, *supra*.

Motion of the Ducktown Sulphur, Copper & Iron Company.

The Ducktown Sulphur, Copper & Iron Company, hereinafter called the Ducktown Company, having also entered a special appearance, moved to dismiss the complainants' bill for want of jurisdiction and misjoinder of the parties defendant.

It is well settled and is not disputed, that the requirement of section 1 of the Act of 1875, as amended by the Act of 1888, that suits in a Circuit Court based upon diverse citizenship alone shall be brought within a district in which either the plaintiff or the defendant resides, has no application to suits brought against aliens, and that if jurisdiction otherwise exists in the Circuit Court, an alien corporation may be sued in any district in which valid service may be made upon it. In re Hohorst, 150 U. S. 653; Barrow Steamship Co. v. Kane, 170 U. S. 100.

The Ducktown Company urges, however, that there is nevertheless a want of jurisdiction in this Court and misjoinder of the defendants upon various grounds set forth in its motion to dismiss.
47 None of these grounds are, however, in my opinion, well taken.

1. The fact that this bill is filed for the purpose of abating or restraining a nuisance affecting lands which lie wholly in the State of Georgia, does not require the action to be brought in the district where the injured property lies and thereby deprives this Court of jurisdiction of the subject matter of the suit.

While an action to abate or restrain a nuisance is of a local nature and can only be maintained in a district having the proper territorial jurisdiction, the venue of such action is in the district where the nuisance itself is located. 29 Cyc. 1237; 14 Enc. Pl. & Pr. 1106, and cases cited.

In Mississippi & M. R. R. Co. v. Ward, 2 Black, 485, 495 it was held under a bill filed by a steamboat owner in the district court of Iowa to abate a bridge across the Mississippi River constituting an obstruction to navigation, that as to so much of the bridge as lay beyond the middle of the river and outside of the district of Iowa the

court "had no power over the local object inflicting the injury" and was without jurisdiction.

And in Horne v. City of Buffalo, 49 Hun. 76, it was held under a statute providing that certain actions, including those for a nuisance, must be tried in the County where the cause of action, or some part thereof, arose, that a suit against a city to abate a nuisance, caused by the dumping of street sweepings and other foul matter into the river in the County where the city was located, which injured residents in a village below in another County, should be tried in the County in which the dumping was done, as being the County in which the cause of action arose. In this case the court said: "By the common law an action for a nuisance is regarded as local in its nature, and the venue is required to be laid in the County where the nuisance is situated."

48 It was also held in People v. St. Louis, 10 Ill. 352, and Morris v. Remington, 2 Pars. Eq. Cas. 387, that the venue under a bill to restrain a nuisance by injunction is in the jurisdiction in which the nuisance is located: a result which would also seem to follow from the doctrine of Northern Ind. R. R. Co. v. Michigan Cent. R. R. Co. 15 How. 232, 242, that wherever the subject matter of a controversy is local, no jurisdiction attaches to a Circuit Court beyond the limit of the District in which the property is situated and no jurisdiction can be granted affecting such property, except in cases of contract, fraud or trust, where relief may be given by a decree *in personam*.

While none of these cases, except the Horne case, presented the precise situation in the present case, where the property constituting the nuisance lies in one district and the injured property in another, the reasoning in the Ward case that where the court "had no power over the local object inflicting the injury," its abatement was beyond the jurisdiction of the court, shows conclusively that the test of local jurisdiction in an action to abate a nuisance is the situs of the object inflicting the injury and not that of the object injured.

The various cases which hold that an action of tort seeking merely to recover damages caused by a nuisance, will lie in the jurisdiction where the injury is inflicted, although the object from which the injury proceeds is located elsewhere—there being, however, much conflict of authority even on this point, as shown by the cases collated in 14 Enc. Pl. & Pr. 1106, notes 2 and 3—clearly involve an entirely different question from that in reference to the venue of an action to abate the nuisance itself. The "power over the local object inflicting the injury" which is requisite in an action to abate the nuisance is wholly unnecessary in an action merely to recover damages, whose result cannot in any way affect the maintenance of the nui-

49 sance itself; and the case holding that in an action of tort for damages alone the venue should be laid where the injured object is located, may it seem, be well sustained by analogy to the rule stated in Northern Ind. R. R. Co., v. Michigan Cent. R. R. Co., *supra* that an action for trespass *quare clausum fregit* cannot be prosecuted where the act complained of was not done in the district.

2. The fact that, so far as the bill shows, the defendants are sepa-

rate and independent concerns, conducting each its own separate affairs, does not prevent the bringing of a joint action against them, or create a misjoinder of the Ducktown Company with its co-defendant.

Without determining whether, in accordance with the broad statement in 2 Street's Fed. Co. Prac. sec. 1344, p. 815, the defence of misjoinder of defendants can be made by motion to dismiss as well as by demurrer, in accordance with the usual practice, I think that the sound rule established by the great weight of authority, is, that in a suit to abate or restrain a nuisance, as distinguished from an action for damages, all persons maintaining structures or carrying on operations whose effect mingles and combines in contributing to the injury of the plaintiff's property, may be properly joined as defendants, although each transacts his own business separately and independently from the others. The Debris Cases, (C. C.) 16 Fed. 25; Warren v. Parkhurst, 186 N. Y. —: Kingsbury v. Flowers, 65 Ala. 479, People v. Ditch & Min. Co. 66 Cal. 138; Woodyear v. Shaefer, 57 Md. 1.

In Oakland v. Water Front Co., 118 Cal. 234, 248, in which it was held that a demurrer would lie for misjoinder, the structures maintained by the different defendants which it was sought to abate as an obstruction to navigation were not only entirely separate and independently maintained, but had obviously no joint or combined effect upon the navigation, the effect of each being entirely separate and distinct from that of the others.

50 3. The fact that the Tennessee Copper Company is not suable in this case, over its objection, does not require the dismissal of the suit as to the Ducktown Company.

It is well settled by the weight of authority that when jurisdiction otherwise exists in a Circuit Court in a suit against several defendants, who might be sued either separately or jointly, the right of one of the defendants to object to the local jurisdiction of the Court on the ground that it is brought in a district in which neither he nor the plaintiff resides, is a privilege personal to himself, which he alone can raise, and in his behalf only, and that upon the dismissal of the suit as to him, upon his motion, where he is not an indispensable party to the suit, it will not be dismissed as to the remaining defendants properly before the Court. Benzinger Cash Reg. Co. v. National Cash Reg. Co.,(C. C.)42 Fed. 81; Smith v. Atchison T. & S. F. R. Co. (C. C.) 64 Fed. 1; Dominion National Bank v. Cotton Mills, (C. C.) 12 Fed. 181; Schiffer v. Anderson (C. C. A. 8th Cir.) 146 Fed. 457.

And jurisdiction of the suit will likewise be retained when although one of the defendants is a citizen of the same State with the plaintiff, whose presence would destroy the requisite diversity of citizenship, the suit has been dismissed as to him without prejudice, Smith v. Cotton Oil,(C. C. A. 5th Cir.)86 Fed. 459; or he has neither been served with process nor appeared. Doreman v. Bennett, 4 McLean, 224, 7 Fed. Cas. 691. Nor can a defendant served with process avail himself of a want of jurisdiction as to another person named in the writ who is severed from him and no longer to be considered a de-

fendant in the case. Craig v. Cummings, 2 Wash. (C. C.) 505, 6 Fed. Cas. 724.

Therefore, since each of the defendants in the present suit might have been sued severally as well as jointly (People v. Ditch Min. Co., 66 Cal. 138) and under the averments of the bill the Tennessee Copper Company is clearly not an indispensable party to the relief
51 prayed in reference to the nuisance alleged to exist upon the property of the Ducktown Company, the case may, under the foregoing authorities, be proceeded with against the latter Company, alone, although dismissed as to the former.

4. The fact, urged in argument, although not set out as one of the grounds of the motion to dismiss, that the plaintiffs, being citizens of New York and West Virginia, have sued two defendants, one of whom is a citizen of New Jersey and the other an alien corporation, does not deprive this court of jurisdiction.

Section 1 of the Act of 1875, as amended by section 1 of the Act of 1888, confers jurisdiction upon the Circuit Courts in suits "in which there shall be a controversy between citizens of different states . . . or a controversy between citizens of a State and foreign citizens." The plain object of this provision is to confer upon the Circuit Courts jurisdiction of all controversies between citizens of a State and citizens either of another State or a foreign nation, in which the requisite jurisdictional amount is involved. And while it may be said, from a somewhat metaphysical point of view, that in a suit brought by a citizen of one State against two defendants, one of whom is a citizen of another State and the other an alien, the controversy, considered in its entirety, is neither wholly between citizens of different states nor between a citizen of a State and a foreign citizen, yet as such controversy in each and all of its elements as between the plaintiff and each of the defendants separately, clearly comes within the provisions of the Act the suit is not, under a just construction of the statute and in view of its plain intent, to be excluded from the jurisdiction of the Circuit Court merely because of the joinder of the two defendants in a single action.

To hold otherwise would, I think, be to give the language of the statute a strained and narrow construction, not required by its letter, and defeating its manifest purpose of vesting in the Circuit Courts jurisdiction of controversies between three different classes of persons.

52 This view is in accordance with the clear weight of authority.

In Ballin v. Lehr, (C. C.) 24 Fed. 193, and Roberts v. Ry. & Nav. Co., (C. C.) 104 Fed. 577, affirmed in a carefully considered opinion in Roberts v. Ry. & Nav. Co., (C. C. A. 9th Cir.) 121 Fed. 785, in each of which the underlying question involved in determining the right of removal to the Circuit Court was whether the entire suit was one of which the Circuit Courts were given jurisdiction by section 1 of the Acts of 1875 and 1888, it was held that a suit brought by a citizen of one State against two defendants, one of whom *si* a citizen of another State and the other an alien, is a suit of which the Circuit Courts are given jurisdiction, and which as such is removable

to the Circuit Court on petition of the defendants. See also Rateau v. Bernard, 3 Blatchf. 242, 20 Fed. Cas. 305.

The case of Tracy v. Morel, (C. C.) 88 Fed. 801, in which the statement of a contrary doctrine, appearing in Black's Dillon on the Removal of Causes (Sec. 84, p. 131)—which is not, however, found in the earlier editions of Dillon's Removal of Causes—is approved, without discussion, is clearly not supported by the cases of Hervey v. Illinois Mid. Ry. Co., 7 Biss. 103, 12 Red. Cas. 60, and King v. Cornell, 106 U. S. 395, which are cited as stating the same rule. The Hervey case involved merely the obvious proposition that a suit could not be removed under the Act of 1875 on the ground of a separate controversy "wholly between citizens of different states" when it appeared that alien parties were also interested in the alleged separate controversy—there being, it is to be noted, no provision in that Act for the removal of a suit on the ground of a separate controversy between citizens of a State and aliens; and in King v. Cornell it was merely held that under the Act of 1875 an alien had no right of removal on the ground of a separate controversy.

53 I therefore conclude, both upon principle and the weight of authority, that a suit brought by a citizen of one State against a citizen of another State and an alien as defendants, involving the requisite jurisdictional amount, is within the jurisdiction of a Circuit Court of the United States.

Furthermore even if there had been originally a jurisdictional defect by reason of the joinder of the Tennessee Copper Company as a co-defendant with the Ducktown Company, this objection would it seems, be cured, under the doctrine of Smith v. Cotton Oil Company and other cases hereinabove cited, by the dismissal of the suit against the Tennessee Copper Company, leaving in the suit merely a controversy between citizens of New York and West Virginia as complainants and an alien corporation as defendant, of which a Circuit Court has undoubted jurisdiction.

5. The objection to the jurisdiction set out in the motion to dismiss in reference to the amount in controversy, has been cured by the amendments made in the bill.

No other objections being pointed out by the Ducktown Company's motion to dismiss, it results that the motion must be overruled.

An order will accordingly be entered dismissing the suit as to the Tennessee Copper Company in accordance with this opinion, and overruling the motion of the Ducktown Sulphur, Copper & Iron Company.

SANFORD, *Judge*.

February 15, 1910.

Endorsed: Filed Feb. 16, 1910. D. L. Snodgrass, Clerk. R. F. McClure, D. C.

54 THE UNITED STATES OF AMERICA,
Eastern District of Tennessee, Southern Division, ss:

I, D. L. Snodgrass, Clerk of the Circuit Court of the United States, within and for the District aforesaid, do hereby certify that the foregoing Thirty-Four Pages is a full, true and perfect transcript of the record and proceedings in the case of George Peabody Wetmore against the Ducktown Sulphur, Copper & Iron Company, Limited, and the Tennessee Copper Company, No. 1047 in this Court, as the same appears of record and on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court, at Chattanooga, Tennessee, this 25th day of March, A. D., 1910.

[Seal Circuit Court of the United States, Eastern District of Tennessee.]

D. L. SNODGRASS, *Clerk.*

Endorsed on cover: File No. 22,100. E. Tennessee C. C. U. S. Term No. 874. George Peabody Wetmore, appellant, vs. Tennessee Copper Company. Filed April 13th, 1910. File No. 22,100.

In The

Supreme Court of the United States

OCTOBER TERM, 1910

George Peabody Wetmore,
Appellant,
versus
Tennessee Copper Company,
Appellee.

No. 874.

State of Tennessee,
County of Knox.

I, Howard Cornick, make oath in due form of law that I am one of the counsel for appellee in the above styled cause, and that I caused a copy of the attached notice, motion and brief of argument, to be served on September 9th, 1910, upon Mr. Charles Seymour, one of the counsel for the appellants, and caused copies thereof to be mailed, to all other of the counsel of record for appellants, that said service of notice of said copies was more than three weeks before the time fixed for submitting the motion, and that the notices to counsel other than Charles Seymour, together with copies of the motion and of the argument were properly addressed to said counsel and duly posted by mail with postage prepaid in time to reach them by due course of mail more than three weeks before the time fixed in said notice for presentation of said motion.

Howard Cornick.

Subscribed and sworn to before me this 12th day of September, 1910.

SEAL.

T. G. McConnell,
Notary Public.

In The

Supreme Court of the United States

OCTOBER TERM, 1910

George Peabody Wetmore,
Appellant,
versus
Tennessee Copper Company,
Appellee.

No. 874.

MOTION TO DISMISS.

And now comes the Tennessee Copper Company, the appellee, and moves the court to dismiss the appeal herein for the following reasons, namely:

It appears that the suit is one against Tennessee Copper Company and the Ducktown Sulphur, Copper & Iron Company, Limited, as defendants jointly. That the right of action sought to be asserted therein is joint and the relief sought therein is joint, (*record, pp.* 1 *to* 11, *inc.*)

It appears also that said action as to the Ducktown Sulphur, Copper & Iron Company, Limited, is still pending and undisposed of in the United States Circuit Court for the Eastern District of Tennessee, Southern Division. (*Record, p.* 16.)

Wherefore, appellee moves to dismiss the appeal as aforesaid because of lack of jurisdiction in this court, said appeal being premature.

Howard Cornick.
John H. Frantz.
Counsel for Appellee.

Martin Vogel,
Of Counsel.

In The

Supreme Court of the United States

OCTOBER TERM, 1910

George Peabody Wetmore,
Appellant,
versus
Tennessee Copper Company,
Appellee.

No. 874.

To Charles Seymour, Charles H. Shield, Benj. F. Washer and Henry B. Glosson, Counsel for Appellant in the above entitled cause:

You will please take notice that on Monday, the tenth day of October, 1910, at the opening of the court, or as soon thereafter as counsel can be heard, the motion, of which the attached is a copy, will be submitted to the Supreme Court of the United States for the decision of the said court thereon. Annexed hereto is a copy of the brief of argument to be submitted with the said motion in support thereof.

Howard Cornick.
John H. Frantz.
Counsel for Appellee.

Martin Vogel,
Of Counsel.

Service of a copy of the above notice is hereby admitted this 9th day of September, 1910.

Charles Seymour,
Counsel for Appellant.

In The

Supreme Court of the United States

OCTOBER TERM, 1910

George Peabody Wetmore,
Appellant,
versus
Tennessee Copper Company,
Appellee.

No. 874.

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL.

Statement of the Case.

The bill in this cause was filed by complainant against the Tennessee Copper Company and the Ducktown Sulphur, Copper & Iron Company, Limited, in the United States Circuit Court for the Eastern District of Tennessee, Southern Division. The Tennessee Copper Company is alleged to be a corporation organized and existing under the laws of the State of New Jersey; the Ducktown Sulphur, Copper & Iron Company, Limited, is alleged in the bill to be a corporation of Great Britain. (*record pp.* 1 *and* 2.) The bill further alleges that complainant is a citizen and resident of the State of Rhode Island, (*record, p.* 1) and is the owner of lands in the State of Tennessee and that these lands have been injured in the past and are being injured by smoke, fumes, gases and vapors emanating from the smelter plants of these two defendants. (*Record, p.* 7.)

In order to show a joint wrong on the part of said defendants and to justify the joint action against them, complainant after alleging the generation of the smoke, gases, etc., in the furnaces of the defendants, says:

"Within a short distance from the works and property of the defendants the said smoke, fumes,

vapors and gases and other deleterious substances so generated by each respectively inextricably mingle and are together discharged upon the lands and forests and trees of your orator, etc." (*Record, p.* 7.)

The relief sought is abatement of the alleged nuisance, together with an injunction against defendants jointly, restraining them from further maintenance thereof, (*record p.* 11.)

Counsel for Tennessee Copper Company entered special appearance in said cause for the purpose of objecting to the jurisdiction of the court, and thereupon moved to dismiss the bill as to that defendant because not brought in the District where the said defendant resided, (*record p.* 13). A like entry of appearance and motion were made on behalf of the defendant Ducktown Sulphur, Copper & Iron Company, Limited, (*record, p.* 15.) Upon the hearing the court sustained the motion of the Tennessee Copper Company and dismissed the bill as to it for lack of jurisdiction, but overruled the motion of the Ducktown Sulphur, Copper & Iron Company, Limited, and retained the bill as to it, (*opinion of the Court, record, pp.* 23 *to* 32, *inc.*) (*See decree, record, p.* 16.)

Thereupon, complainant prayed an appeal to this Court which was allowed, (*record, pp.* 17, 18 *and* 20.)

Upon motion of complainant the cause has been advanced upon the docket and stands for hearing on October 11th, 1910.

The appeal is premature, and, therefore, the Court is without jurisdiction to hear and determine the same.

ARGUMENT.

Probably the leading case upon this question is that of *Mohurst versus Hamburg-American Packet Company,* 148 *U. S. Supreme Court Reports, p.* 262. The suit in that case was against the Hamburg-American Packet

Company and several individual defendants. Motion was made by the Hamburg-American Packet Company to dismiss as to it because of lack of jurisdiction in the court. This motion was sustained and an appeal taken to this court. The court in its opinion said:

"So far as appears from the record, the suit is still pending and undetermined as against the co-defendants of the company. We are of opinion, therefore, that this appeal cannot be maintained because the decree rendered in favor of the company was not a final decree." *Page* 264.

After discussion of authorities, the court concludes:

"There are cases in equity in which a decree disposing of every ground of contention between the parties, except as to the ascertainment of an amount in a matter separable from the other subjects of controversy, and relating only to some of the defendants, may be treated as final, though retained for the determination of such severable matter. *Hill vs. Chicago & Evanston Railroad,* 140 *U. S.,* 52. But this case presents no such aspect. Complainant insisted, by his amended bill, that the alleged liability was joint, and that, "all the defendants have cooperated and participated in all the said acts and infringements."

"*In Shaw vs. Quincy Mining Co.,* 145 *U. S.,* 444, a bill was filed against the mining company and others in the Circuit Court of the United States for the Southern District of New York, and service of subpoena was made upon the secretary of the company. The company appeared specifically and moved for an order to set aside the service, which was granted, whereupon complainant applied to this court by petition for writ of mandamus to the judges of the Circuit Court to command them to take jurisdiction against the company upon the bill. The ground on which our jurisdiction was invoked was the inadequacy of any other remedy, and it was ar-

gued that as the same could proceed as to the other defendants, no final judgment could be entered upon the order of the Circuit Court and no appeal taken therefrom.

Under the circumstances

This appeal must be dismissed for want of jurisdiction, and it is so ordered."

This case is in striking analogy to the case at bar. The allegations of the bill tend to show joint liability on the part of the defendants, and, as in the case above quoted, the ground of jurisdiction is the "inadequacy of any other remedy."

Another case in point is *Bank of Rondout vs. Smith*, 156 *U. S. Rep., p.* 330, and the Court distinguished the case from that of *Hill vs. Chicago & Evanston Railroad*, 140 *U. S.*, as follows:

"In Hill vs. Chicago & Evanston Railroad, 140 U. S., 52, a decree had been rendered June 8th, 1885, dismissing a bill as to certain parties for want of equity, and denying relief to complainant upon all matters and things in controversy except as to an amount of money paid by one of the defendants, and for the purpose of ascertaining that amount the case was retained as to some of the defendants, which finally resulted in a decree, July 14, 1887, as to that severable matter. It was held that, under these circumstances, the decree of June 8th, 1885, was final decree as to all matters determined by it, and that its finality was not affected by the fact that there was left to be determined a further severable matter, in respect of which the case was retained only as against the parties interested in that matter. An appeal had been prayed from the decree of June 8th, 1885, but the transcript of the record not having been filed at the next term after the appeal was taken, it was, on motion, dismissed. *Hill vs. Chicago & Evanston Railroad*, 129 *U. S.*, 170."

The same rule is laid down in ex parte *National Enameling Company*, 201, *U. S., p.* 160. In distinguish-

ing between *Hill versus Chicago & Evanston Railroad*, supra, and *Hohurst vs. Hamburg, etc.*, supra, this court said:

> "In Hill vs. Chicago & Evanston Railroad Company, supra, there had been an order of dismissal in favor of some defendants together with a reference to a master of a separable controversy between the plaintiff and other parties, and the court observed. (P. 54.)
>
> "But there was no adjudication as to the payment of the amount to be ascertained by the master; that remained unsettled; it was, however, a severable matter from the other subjects of controversy and did not affect their determination. The fact that it was not disposed of did not change the finality of the decree as to the defendants against whom the bill was dismissed; that amount, or to whom made payable, did not concern them. They were no longer parties to the suit for any purpose. The appeal from the subsequent decree did not reinstate them. All the merits of the controversy pending between them and the complainant were disposed of, and could not be again reopened, except on appeal from that decree. As to the other parties, it remained to ascertain the amount of one item and to determine as to its payment."
>
> "But as held in Hohurst vs. Hamburg-American Packet Company, supra, that rule does not apply to cases where the liability of the defendants is alleged to be joint; and, therefore, cannot be a case in which there is but a single defendant."

It is confidently submitted that the appeal is premature and, as stated in Hohurst vs. Hamburg-American Packet Company, supra, "must be dismissed for want of jurisdiction."

All of which is respectfully submitted.

HOWARD CORNICK.
JOHN H. FRANTZ.
Counsel for Appellee.

MARTIN VOGEL,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 874.

GEORGE PEABODY WETMORE, APPELLANT,

against

TENNESSEE COPPER COMPANY, RESPONDENT.

Appeal from a decree of the Circuit Court of the United States for the Eastern District of Tennessee, entered upon an opinion of Hon. Edward T. Sanford, D. J., dismissing, for want of jurisdiction, as against the Tennessee Copper Company, a suit in equity originally brought against it and another defendant, the Ducktown Sulphur, Copper & Iron Company.

Statement of Facts.

This was a suit in equity to abate as a nuisance certain furnaces, smelters, and ovens maintained, some by the defendant, the Tennessee Company, and others by the defendant, the Ducktown Company, in the Eastern District of Tennessee, to the injury of some 30,000 acres of farm and timber lands owned by the complainant in the county of Polk, in the State of Tennessee. The complainant is a citi-

zen and resident of the State of Rhode Island. The Tennessee Copper Company is incorporated under the laws of the State of New Jersey; the Ducktown Company under the laws of Great Britain and Ireland. The smelting ovens of the two defendants are in close proximity, and from them quantities of sulphurous acid gas and other noxious vapors commingle and are discharged upon the lands of the complainant, to the irreparable injury of the lands. It is unnecessary to set out the facts in further detail, as they were all brought to the attention of this court in the previous case of the State of Georgia against the same defendants (206 U. S., 230). This suit is a companion suit to that of Ladew *et al. vs.* Tennessee Copper Co., No. 495, October Term, 1910. By stipulation of counsel and so allowed by the court, the motion to dismiss the appeal and the hearing of this case will be taken up with said Ladew case and the brief and reply briefs filed in that cause, No. 495, October Term, 1910, will be treated as if filed in both causes.

Respectfully submitted,

CHARLES SEYMOUR,
Counsel for Appellant.